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4-19-1984

## Korematsu v. United States, Opinion on Petition for Coram Nobis Relief

United States District Court, Northern District of California

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1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3

4 FRED KOREMATSU, )

5 Plaintiff, )

6 vs. )

7 UNITED STATES OF AMERICA, )

8 Defendant. )  
9

NO. CR-27635

OPINION

APR 18 7 11 AM '54  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CA  
WILLIAM J. WILSON  
CLERK

10 Fred Korematsu is a native born citizen of the United  
11 States. He is of Japanese ancestry. On September 8, 1942 he  
12 was convicted in this court of being in a place from which all  
13 persons of Japanese ancestry were excluded pursuant to Civilian  
14 Exclusion Order No. 34 issued by Commanding General J. L.  
15 DeWitt. His conviction was affirmed. Korematsu v. United  
16 States, 323 U.S. 214 (1944).

17 Mr. Korematsu now brings this petition for a writ of coram  
18 nobis to vacate his conviction on the grounds of governmental  
19 misconduct. His allegations of misconduct are best understood  
20 against the background of events leading up to his conviction.

21 On December 8, 1941 the United States declared war on  
22 Japan.

23 Executive Order No. 9066 was issued on February 19, 1942  
24 authorizing the Secretary of War and certain military commanders  
25 "to prescribe military areas from which any persons may be  
26 excluded as protection against espionage and sabotage."

27 Congress enacted §97a of Title 18 of the United States Code,  
28

1 enforcing the exclusions promulgated under the Executive Order.  
2 Section 97a made it a misdemeanor for anyone to enter or remain  
3 in any restricted military zone contrary to the order of a  
4 military commander.

5 In the meantime, General DeWitt was designated Military  
6 Commander of the Western Defense Command which consisted of  
7 several western states including California.

8 On March 2, 1942 General DeWitt issued Public Proclamation  
9 No. 1 pursuant to Executive Order 9066. The proclamation stated  
10 that "the entire Pacific Coast . . . is subject to espionage and  
11 acts of sabotage, thereby requiring the adoption of military  
12 measures necessary to establish safeguards against such enemy  
13 operations."

14 Thereafter, several other proclamations based upon the same  
15 justification were issued placing restrictions and requirements  
16 upon certain persons, including all persons of Japanese  
17 ancestry. As a result of these proclamations and Exclusion  
18 Order No. 34, providing that all persons of Japanese ancestry  
19 be excluded from an area specified as Military Area No. 1,  
20 petitioner, who lived in Area No. 1, could not leave the zone in  
21 which he resided and could not remain in the zone unless he were  
22 in an established "Assembly Center". Petitioner remained in the  
23 zone and did not go to the Center. He was charged and convicted  
24 of knowingly remaining in a proscribed area in violation of  
25 §97a.

26 It was uncontroverted at the time of conviction that  
27 petitioner was loyal to the United States and had no dual  
28

1 allegiance to Japan. He had never left the United States. He  
2 was registered for the draft and willing to bear arms for the  
3 United States.

4 In his papers petitioner maintains that evidence was  
5 suppressed or destroyed in the proceedings that led to his  
6 conviction and its affirmance. He also makes substantial  
7 allegations of suppression and distortion of evidence which  
8 informed Executive Order No. 9066 and the Public Proclamations  
9 issued under it. While the latter may be compelling, it is not  
10 for this court to rectify. However, the court is not powerless  
11 to correct its own records where a fraud has been worked upon it  
12 or where manifest injustice has been done.

13 The question before the court is not so much whether the  
14 conviction should be vacated as what is the appropriate ground  
15 for relief. A description of the procedural history of these  
16 proceedings explains this posture.

#### 17 18 PROCEDURAL HISTORY OF THESE PROCEEDINGS

19 Petitioner filed his petition for a writ of coram nobis on  
20 January 19, 1983. The first scheduled status conference was  
21 conducted on March 14, 1983, when all parties appeared before  
22 the court. At that time the petition was deemed a motion and  
23 the government was ordered to respond by August 29, 1983.  
24 Petitioner's reply to the government's response was set for  
25 September 26, 1983, and a hearing on the petition was scheduled  
26 for October 3, 1983. Informal discovery was conducted in  
27 accordance with the agreement arrived at during the conference.  
28 Thereafter, the government moved for an extension based upon the

1 forthcoming report of the Commission on Wartime Relocation and  
2 Internment of Civilians ("Commission"), which it anticipated  
3 would have a substantial bearing on these proceedings. The  
4 motion for a continuance was opposed. The court granted the  
5 motion, giving the government until September 27, 1983 to  
6 respond, and setting October 25, 1983 for petitioner's reply and  
7 November 4 for a hearing on the petition. Thereafter, the  
8 government was given a further extension, to October 4, for the  
9 filing of its response. On October 4, 1983, a document entitled  
10 "Government's Response and Motion Under L. R. 220-6"  
11 ("Response") was filed. The substance of the Response consists  
12 of less than four pages. In fact, it is not an opposition to  
13 the petition, but a counter-motion to vacate the conviction and  
14 dismiss the underlying indictment.<sup>1/</sup> It is denominated a motion  
15 under Local Rule 220-6, pertaining to the hearing of related  
16 motions.

17 On October 31, petitioner filed his reply and Request for  
18 Judicial Notice. The government filed its Preliminary Response  
19 to the Request for Judicial Notice on November 7, 1983. A  
20 hearing on the petition and counter-motion was conducted on  
21 November 10, 1983.

22 Because the government maintains that the court should  
23 grant its motion and not reach the merits of the petition, the  
24 counter-motion is considered first.

25  
26 THE GOVERNMENT'S COUNTER-MOTION

27 The government does not specifically designate in its  
28 memorandum the grounds for its motion. It relies upon Rinaldi

1 v. United States, 434 U.S. 22 (1977) and United States v. Hamm,  
2 659 F.2d 624, 631 (5th Cir. 1981) (en banc), in which motions  
3 were made pursuant to Fed. R. Crim. P. 48(a). At the hearing  
4 the government acknowledged Rule 48(a) as the premise for its  
5 motion.

6 Rule 48(a) has its antecedents in the common law doctrine  
7 of nolle prosequi. An understanding of that doctrine is  
8 necessary to a discussion of the Rule's application here. As  
9 the literal translation of nolle prosequi - "I am unwilling to  
10 prosecute" - makes clear, the primary purpose of the doctrine  
11 was to allow the government to cease active prosecution. At  
12 common law, and before Rule 48(a) was enacted, prosecution was  
13 within the exclusive jurisdiction of the prosecuting attorney at  
14 the early stages of the proceedings and a nolle prosequi could  
15 be entered at any time before the jury was empaneled.  
16 Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868).

17 However, as the case progressed, the prosecuting attorney  
18 lost the unilateral right to enter a nolle prosequi. After the  
19 jury was sworn and evidence heard, the defendant had the right  
20 to object to the entry of a nolle prosequi and the effect of the  
21 entry at that stage was a verdict of acquittal. United States  
22 v. Schoemaker, 27 F. Cas. 1066 (C.C.D. Ill. 1840) (No. 16,279).  
23 While the prosecutor's unilateral power to enter a nolle  
24 prosequi apparently revived just after the verdict was returned,  
25 once a sentence had been handed down or final judgment entered,  
26 that unilateral right of the prosecutor was again extinguished.  
27 United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945).  
28

1           With the adoption of Rule 48(a), the absolute authority of  
2 the prosecutor was tempered and leave of court was required  
3 for dismissal of an indictment, information or complaint at any  
4 stage of the proceedings. Although there is a substantial body  
5 of case law dealing with the scope of the court's authority to  
6 grant or deny leave to dismiss, little has been written about  
7 the time within which a Rule 48(a) dismissal may be brought.

8           There is nothing to suggest that the Rule was intended to  
9 extend the nolle prosequi privilege beyond that allowed at  
10 common law. In fact, the purpose of the Rule was to place some  
11 fetters on prosecutorial discretion. Fed. R. Crim. P. 48(a)  
12 advisory committee note 1. The plain language of the section is  
13 also instructive. The Rule allows for dismissal, with leave, of  
14 an indictment, information or complaint, whereupon "the  
15 prosecution shall . . . terminate." As the Rule provides that  
16 upon the court's approval of a nolle prosequi, the prosecution  
17 will terminate, it clearly contemplates action by the  
18 prosecuting agency only while control of the prosecution still  
19 lies, at least in part, with it. By contrast, the prosecutor  
20 has no authority to exercise his nolle prosequi prerogatives at  
21 common law or to invoke Rule 48(a) after a person has been  
22 subject to conviction, final judgment, imposition of sentence  
23 and exhaustion of all appeals and, indeed, after a lapse of many  
24 years. At that stage, there is no longer any prosecution to be  
25 terminated.

26           United States v. Weber, 721 F.2d 266 (9th Cir. 1983) does  
27 not compel a different interpretation. In Weber, as in the  
28

1 cases upon which it relies, the Rule 48(a) motion was made  
2 during the pendency of the proceedings. Applying the same  
3 rationale, that dismissal is a possibility while the case is  
4 still being actively prosecuted, the Supreme Court, even after  
5 it has granted a petition for a writ of certiorari, has remanded  
6 to allow the government to dismiss charges against the  
7 petitioner. E.g., Watts v. United States, 422 U.S. 1032 (1975).  
8 This is because Rule 48(a) and the right of nolle prosequi  
9 emanate from the Executive's power to initiate a criminal  
10 prosecution and to terminate a pending prosecution. See United  
11 States v. Cowan, 524 F.2d 504, 507 (5th Cir. 1975), cert.  
12 denied sub nom. Woodruff v. United States, 425 U.S. 971 (1976)  
13 (citing United States v. Cox, 342 F.2d 167 (5th Cir. 1965),  
14 cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935 (1965)).

15 The court finds no authority for the proposition that a  
16 Rule 48(a) motion may be made long after the prosecution has  
17 come to rest, the judgment is final, appeals have been  
18 exhausted, judgment imposed and the sentence served.

#### 19 20 THE PETITION FOR A WRIT OF CORAM NOBIS

21 A writ of coram nobis is an appropriate remedy by which the  
22 court can correct errors in criminal convictions where other  
23 remedies are not available. Although Rule 60(b), Fed. R. Civ.  
24 P., abolishes various common law writs, including the writ of  
25 coram nobis in civil cases, the writ still obtains in criminal  
26 proceedings where other relief is wanting. United States v.  
27 Morgan, 346 U.S. 502 (1954). See also James v. United States,  
28



1        U.S.       , 103 S. Ct. 465 (1982) (dissenting opinion in  
2 denial of petition for writ of certiorari explaining purpose of  
3 coram nobis); Chresfield v. United States, 381 F. Supp. 301, 302  
4 (E.D. Pa. 1974).

5        While the habeas corpus provisions of 28 U.S.C. §2255  
6 supplant most of the functions of coram nobis, particularly in  
7 light of the federal courts' expanded view of custody, habeas  
8 corpus is not an adequate remedy here. Petitioner's sentence  
9 has been served. He cannot meet the "in custody" requirements  
10 of §2255 under any interpretation of that section. See Hensley  
11 v. Municipal Court, 411 U.S. 345 (1973) (discussing meaning of  
12 custody in context of 28 U.S.C. §2254 requirements); Jones v.  
13 Cunningham, 371 U.S. 236 (1963) (finding the restraints of  
14 parole sufficient to constitute custody for the purposes of  
15 habeas proceedings under §2254); Azzone v. United States, 341  
16 F.2d 417 (8th Cir. 1965), cert. denied sub. nom. Azzone v.  
17 Tahash, 390 U.S. 970 (applying the custody requirement in §2255  
18 proceedings). It is in these unusual circumstances that an  
19 extraordinary writ such as the writ of coram nobis is  
20 appropriate to correct fundamental errors and prevent injustice.  
21 United States v. Correa-De Jesus, 708 F.2d 1283 (7th Cir. 1983).

22        The source of the court's power to grant coram nobis relief  
23 lies in the All Writs Act, 28 U.S.C. §1651(a). The petition is  
24 appropriately heard by the district court in which the  
25 conviction was obtained. Morgan, 346 U.S. at 512. This is so  
26 even though the judgment has been appealed and affirmed by the  
27 Supreme Court. Appellate leave is not required for a trial  
28

1 court to correct errors occurring before it. Standard Oil of  
2 California v. United States, 429 U.S. 17 (1976).

3 Coram nobis being the appropriate vehicle for petitioner to  
4 seek relief, I turn to the question of how the court shall  
5 proceed in this unusual case.

6 While the government would have this court grant its motion  
7 and look no further, petitioner asks this court to look behind  
8 the conviction, view the "evidence" that has now come to light  
9 and make findings of fact. The court concludes that the first  
10 alternative, although easy, is not available; the second  
11 alternative is unnecessary.

12 Even were the government in a position to move under Rule  
13 48(a) of the Fed. R. Crim. P., the court would not automatically  
14 grant dismissal. A limited review by the court is necessary,  
15 even where the defendant consents. The purpose of this limited  
16 review is to protect against prosecutorial impropriety or  
17 harassment of the defendant and to assure that the public  
18 interest is not disserved. United States v. Cowan, 524 F.2d at  
19 512-13.<sup>2/</sup>

20 This Circuit has resolved that petitions for a writ of  
21 coram nobis should be treated in a manner similar to §2255  
22 habeas corpus petitions. United States v. Taylor, 648 F.2d 565  
23 (9th Cir.), cert. denied, 454 U.S. 866 (1981). Thus, the nature  
24 of the court's inquiry is substantially more expansive than  
25 under Rule 48(a). For example, §2255 considerations apply in  
26 determining whether an evidentiary hearing is required. 648  
27 F.2d at 573 n.25.  
28

1           In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court  
2 provided instructions to the district courts as to when  
3 evidentiary hearings should be held in state habeas cases under  
4 28 U.S.C. §2254. It is clear that care must be taken and a  
5 hearing afforded when a palpable claim is raised by the  
6 petitioner and there is an inadequate record or disputed factual  
7 issues. However, the Court acknowledged that district courts  
8 have substantial discretion and should not be put to conducting  
9 unnecessary evidentiary hearings. The parties may choose to  
10 rely upon the record or an expanded record and forego an  
11 evidentiary hearing. The same standards apply in habeas  
12 proceedings under §2255. See Sosa v. United States, 550 F.2d  
13 244, 250-56 (5th Cir. 1977) (separate opinion of Judge Tuttle  
14 and collected citations therein). And where "on the facts  
15 admitted, it may appear that, as matter of law, the prisoner is  
16 entitled to the writ" no hearing need be held. Walker v.  
17 Johnston, 312 U.S. 275, 284 (1941).

18           On a motion under §2255, the government must establish that  
19 there is no genuine issue of material fact; the petitioner is  
20 entitled to the benefit of favorable inferences. Honneus v.  
21 United States, 509 F. Supp. 1135, 1138 (D. Mass. 1981). Where,  
22 as here, the government offers no opposition and, in effect,  
23 joins in a similar request for relief, an expansive inquiry is  
24 not necessary. In fact, the government agrees petitioner is  
25 entitled to relief and concedes: "There is, therefore, no  
26 continuing reason in this setting for the court to convene  
27 hearings or make findings about petitioner's allegations of  
28 governmental wrongdoing in the 1940's."

1 Response at 3. However, even where the government has  
2 acknowledged that the conviction should be set aside, albeit on  
3 different grounds, the court must conduct some review to  
4 determine whether there is support for the government's  
5 position.

6 Ordinarily, in cases in which the government agrees that a  
7 conviction should be set aside, the government's position is  
8 made clear because it confesses error, calling to the court's  
9 attention the particular errors upon which the conviction was  
10 obtained. A confession of error is generally given great  
11 deference. Where that confession of error is made by the  
12 official having full authority for prosecution on behalf of the  
13 government it is entitled to even greater deference. See Sibron  
14 v. State of New York, 392 U.S. 40, 58-59 (1968). Even so, the  
15 court must conduct its own review. Young v. United States, 315  
16 U.S. 257 (1942).

17 In this case, the government, joining in on a different  
18 procedural footing, is not prepared to confess error. Yet it  
19 has not submitted any opposition to the petition, although given  
20 ample opportunity to do so. Apparently the government would  
21 like this court to set aside the conviction without looking at  
22 the record in an effort to put this unfortunate episode in our  
23 country's history behind us.

24 The government has, however, while not confessing error,  
25 taken a position tantamount to a confession of error. It has  
26 eagerly moved to dismiss without acknowledging any specific  
27 reasons for dismissal other than that "there is no further  
28

1 usefulness to be served by conviction under a statute which has  
2 been soundly repudiated." (R.T. 13:20-22, November 10, 1983).  
3 In support of this statement, the government points out that in  
4 1971, legislation was adopted requiring congressional action  
5 before an Executive Order such as Executive Order 9066 can ever  
6 be issued again; that in 1976, the statute under which  
7 petitioner was convicted was repealed; and that in 1976, all  
8 authority conferred by Executive Order 9066 was formally  
9 proclaimed terminated as of December 31, 1946. While these are  
10 compelling reasons for concluding that vacating the conviction  
11 is in the best interests of this petitioner, respondent and the  
12 public, the court declines the invitation of the government to  
13 treat this matter in the perfunctory and procedurally improper  
14 manner it has suggested.

15 On the other hand, this court agrees that it is not  
16 necessary to reopen the partially healed wounds of an earlier  
17 period in order to perform its role of conducting independent  
18 judicial review. Fortunately, there are few instances in our  
19 judicial history when courts have been called upon to undo such  
20 profound and publicly acknowledged injustice. Such extra-  
21 ordinary instances require extraordinary relief, and the court  
22 is not without power to redress its own errors.<sup>3/</sup>

23 Because the government has not acknowledged specific  
24 errors, the court will look to the original record and the  
25 evidence now before it to determine whether there is support for  
26 the petition and whether manifest injustice would be done in  
27 letting the conviction stand.  
28

1                   EVIDENTIARY ISSUES

2           The "evidence" before this court consists of certain  
3 documents and reports of which petitioner asks the court to take  
4 judicial notice. The posture of this request is curious. In  
5 response to the request, the government filed a "Preliminary  
6 Response." This was filed three days before the hearing on the  
7 petition. In its "Preliminary Response," the government did not  
8 take issue with the merits of petitioner's request for judicial  
9 notice. Its response was merely "designed to convey our general  
10 objections" and the government offered to file a full response  
11 if requested by the court. It then went on to make further  
12 arguments in favor of its own motion. Again, this was on the  
13 eve of a hearing which had been postponed and for which the  
14 government had had ample opportunity to formulate a response.  
15 At the first hearing, as noted below, the question of judicial  
16 notice had been raised and discussed.

17           The matters which petitioner asks the court to judicially  
18 notice are the Report of the Commission on Wartime Relocation  
19 and Internment of Civilians, entitled "Personal Justice Denied",  
20 (Washington, D.C., 1982) ("Report") and certain government  
21 documents, the authenticity of which is not in dispute.

22           When the parties are in agreement that the court may take  
23 judicial notice of certain matters, or that records may be  
24 admitted as public records, the court need not make as searching  
25 an inquiry as when notice or admissibility is disputed. Similar  
26 considerations apply here, as the government, rather than  
27 actually opposing the request and supplying reasons for such  
28

1 opposition, has merely suggested it may oppose the request. In  
2 fact, at the hearing on March 14, 1983, in answer to the court's  
3 question whether it "would agree that it is appropriate for the  
4 court to take judicial notice of the Report," the attorney for  
5 the government responded, "absolutely." Despite this  
6 acquiescence, care should be taken to consider only trustworthy  
7 and reliable evidence. Thus, I look first to whether the  
8 documents proffered may be judicially noticed or otherwise  
9 admitted.

10 Judicial notice may be taken of adjudicative facts in  
11 accordance with Fed. R. Evid. 201, as well as of legislative  
12 facts. The distinction between the two is not always readily  
13 apparent. See 1 Weinstein's Evidence ¶200[04], at 200-19.  
14 Adjudicative facts are usually those facts that are in issue in  
15 a particular case. Judicial notice of adjudicative facts  
16 dispenses with the need to present other evidence or for the  
17 factfinder to make findings as to those particular facts. Rule  
18 201 provides that only those adjudicative facts which are not  
19 subject to reasonable dispute because they are generally known  
20 or "capable of accurate and ready determination by resort to  
21 sources whose accuracy cannot reasonably be questioned" may be  
22 judicially noticed.

23 Legislative facts are "established truths, facts or  
24 pronouncements that do not change from case to case but [are  
25 applied] universally, while adjudicative facts are those  
26 developed in a particular case." United States v. Gould, 536  
27 F.2d 216, 220 (8th Cir. 1976). Legislative facts are facts of  
28

1 which courts take particular notice when interpreting a statute  
2 or considering whether Congress has acted within its  
3 constitutional authority. For example, courts frequently take  
4 judicial notice of legislative history, including committee  
5 reports. See Territory of Alaska v. American Can Co., 358 U.S.  
6 224, 227 (1959). So, too, historical facts, commercial  
7 practices and social standards are frequently noticed in the  
8 form of legislative facts. See Leo Sheep Co. v. United States,  
9 440 U.S. 668 (1979); Jay Burns Baking Co. v. Bryan, 264 U.S.  
10 504, 517-33 (1923) (Justice Brandeis' dissent takes an expansive  
11 view of when scientific and commercial practices may be  
12 judicially noticed); and United States v. Various Articles of  
13 Obscene Merchandise, Schedule No. 1303, 562 F.2d 185, 187 n.4  
14 (2d Cir. 1977).

15 However, petitioner seeks to have this court take judicial  
16 notice of the actual findings of the Commission and matters  
17 stated in documents contained in government files. To the  
18 extent these matters are offered on the issue of governmental  
19 misconduct they are offered on the ultimate issue. Taking  
20 judicial notice of them would be inappropriate, as it would  
21 render them conclusive according to Rule 201(g).

22 Care must be taken that Rule 201 not be used as a  
23 substitute for more rigorous evidentiary requirements and  
24 careful factfinding. For example, if the Commission's findings  
25 were proffered as public records under Rule 803(8), Fed. R.  
26 Evid., the foundational requirements of subparagraph (8) would  
27 need to be met and the findings, if admitted, would be weighed  
28



1 along with other evidence. Judicial notice cannot be used to  
2 shortcut the evidentiary hearing process. Nevertheless, courts  
3 have found it appropriate to take judicial notice of current  
4 economic conditions, Mainline Investment Corp. v. Gaines, 407 F.  
5 Supp. 423, 427 (N.D. Tex. 1976) and historical evidence, Oneida  
6 Indian Nation of New York v. New York, 691 F.2d 1070, 1086 (2d  
7 Cir. 1982), as adjudicative facts under Rule 201. In these  
8 instances the facts judicially noticed went to the matter in  
9 issue, such as the defense of extraordinary economic cause  
10 asserted in a breach of contract claim in Mainline Investment.  
11 In Oneida Indian Nation the Second Circuit generally approved  
12 taking judicial notice of individual records, notes, corres-  
13 pondence, histories and other articles of the late eighteenth  
14 century as "historical evidence," but concluded that it was  
15 error for the lower court to do so where the data was in  
16 dispute. Indeed, this Circuit has urged a cautious approach,  
17 observing that "the taking of evidence, subject to established  
18 safeguards, is the best way to resolve controversies involving  
19 disputes of adjudicative facts." Banks v. Schweiker, 654 F.2d  
20 637, 640 (9th Cir. 1981).

21 Two factors make the particular stance of this case  
22 unusual. The government has neither interposed any specific  
23 objection nor put any facts in controversy.<sup>4/</sup> Furthermore, this  
24 is not a matter which will ultimately be decided by a jury.  
25 Where the function of the court is to act as a factfinder or  
26 exercise its discretion, more leeway to take judicial notice is  
27 justified. See C. McCormick, Evidence §332 (2d ed. 1972).  
28

1 Still, the court should be careful in deciding whether to take  
2 judicial notice of the records proffered.

3 In light of these concerns, the court finds it proper to  
4 take judicial notice of the purpose of the Commission, the  
5 manner in which it was established and, subject to a finding of  
6 trustworthiness, the general nature and substance of its  
7 conclusions. Judicial notice of these facts may be used to  
8 inform the court's determination of whether denial of the motion  
9 would result in manifest injustice, of the public interest to be  
10 served by the granting of the motion, and of whether there is  
11 support for the government's acquiescence. See Southern  
12 Louisiana Area Rate Cases v. Federal Power Commission, 428 F.2d  
13 407, 438 n.98 (5th Cir. 1970) (court may take judicial notice of  
14 concerns of the Federal Power Commission as expressed in  
15 speeches given by Commissioners even though specific facts  
16 stated may not be judicially noticed); Overfield v. Pennroad  
17 Corp., 146 F.2d 889, 898 (3d Cir. 1944) (court may take judicial  
18 notice of "Congressional proceedings and the existence of facts  
19 disclosed by them") (emphasis supplied)).

20 The court concludes it is not proper or necessary to take  
21 judicial notice of the specific Commission findings and  
22 conclusions as adjudicative facts under §201, despite the  
23 government's failure to adequately object.<sup>5/</sup>

#### 24 25 THE COMMISSION REPORT

26 The Commission on Wartime Relocation and Internment of  
27 Civilians was established in 1980 by an act of Congress. It was  
28

1 directed to review the facts and circumstances surrounding  
2 Executive Order 9066 and its impact on American citizens and  
3 permanent resident aliens; to review directives of the United  
4 States military forces requiring the relocation and, in some  
5 cases, detention in internment camps of American citizens,  
6 including those of Japanese ancestry; and to recommend  
7 appropriate remedies. Commission on Wartime Relocation and  
8 Internment of Civilians Act, Pub. L. No. 96-317, §2, 94 Stat.  
9 964 (1980).

10 The Commission was mandated to submit a written report of  
11 its findings and recommendations to Congress. It was given  
12 authority to conduct hearings, and to compel attendance of  
13 witnesses and production of documents, including documents in  
14 the possession of governmental agencies and departments.

15 The Commission was composed of former members of Congress,  
16 the Supreme Court and the Cabinet as well as distinguished  
17 private citizens. It held approximately twenty days of hearings  
18 in cities across the United States, taking the testimony of over  
19 720 witnesses, including key government personnel responsible  
20 for decisions involved in the issuance of Executive Order 9066  
21 and the military orders implementing it. The Commission  
22 reviewed substantial numbers of government documents, including  
23 documents not previously available to the public.

24 In light of all these factors, the Report carries  
25 substantial indicia of trustworthiness.<sup>6/</sup> Indeed, as noted  
26 above, the government conceded at the March 1983 status  
27 conference that the Report was an appropriate subject of  
28

1 judicial notice. It acknowledged it was awaiting the final  
2 Report before formulating any policy with respect to this  
3 petition and related Japanese internment matters. After  
4 issuance of the Report, the government announced its decision to  
5 move to dismiss the charges. It appears it is relying on the  
6 Report in substantial measure for its own recommendations.<sup>7/</sup>

7 The findings and conclusions of the Commission were  
8 unanimous. In general, the Commission concluded that at the  
9 time of the issuance of Executive Order 9066 and implementing  
10 military orders, there was substantial credible evidence from a  
11 number of federal civilian and military agencies contradicting  
12 the report of General DeWitt that military necessity justified  
13 exclusion and internment of all persons of Japanese ancestry  
14 without regard to individual identification of those who may  
15 have been potentially disloyal.

16 The Commission found that military necessity did not  
17 warrant the exclusion and detention of ethnic Japanese. It  
18 concluded that "broad historical causes which shaped these  
19 decisions [exclusion and detention] were race prejudice, war  
20 hysteria and a failure of political leadership." As a result,  
21 "a grave injustice was done to American citizens and resident  
22 aliens of Japanese ancestry who, without individual review or  
23 any probative evidence against them, were excluded, removed and  
24 detained by the United States during World War II." Personal  
25 Justice Denied at 18.

26 The Commission's Report provides ample support for the  
27 conclusion that denial of the motion would result in manifest  
28

1        injustice and that the public interest is served by granting the  
2        relief sought.

3  
4                GOVERNMENT MEMORANDA

5                Petitioner offers another set of documents showing that  
6        there was critical contradictory evidence known to the  
7        government and knowingly concealed from the courts. These  
8        records present another question regarding the propriety of  
9        judicial notice. They consist of internal government memoranda  
10       and letters. Their authenticity is not disputed. Yet they are  
11       not the kind of documents that are the proper subject of  
12       judicial notice, and they are offered on the ultimate issue of  
13       governmental misconduct.

14               The internal memoranda and letters may, however, be  
15       considered by the court as evidence under Rule 803(1) or  
16       803(16). Alternatively, because they are not actually offered  
17       for the truth of the statements contained in them, but rather  
18       as evidence that the statements were made (i.e., verbal  
19       conduct), they may be admitted as non-hearsay within the purview  
20       of 801(c).<sup>8/</sup>

21               The substance of the statements contained in the documents  
22       and the fact the statements were made demonstrate that the  
23       government knowingly withheld information from the courts when  
24       they were considering the critical question of military  
25       necessity in this case. A series of correspondence regarding  
26       what information should be included in the government's brief  
27       before the Supreme Court culminated in two different versions of  
28       a footnote that was to be used to specify the factual data upon

1 which the government relied for its military necessity  
2 justification. The first version read as follows:

3 The Final Report of General DeWitt (which  
4 is dated June 5, 1943, but which was not  
5 made public until January 1944) is relied  
6 on in this brief for statistics and other  
7 details concerning the actual evacuation  
8 and the events that took place subsequent  
9 thereto. The recital of the circumstances  
10 justifying the evacuation as a matter of  
11 military necessity, however, is in several  
12 respects, particularly with reference to  
13 the use of illegal radio transmitters and  
14 to shore-to-ship signalling by persons of  
15 Japanese ancestry, in conflict with infor-  
16 mation in the possession of the Department  
17 of Justice. In view of the contrariety  
18 of the reports on this matter we do not  
19 ask the Court to take judicial notice of  
20 the recital of those facts contained in  
21 the Report.

22 Petitioner's Exhibit AA, Memorandum of  
23 John L. Burling to Assistant Attorney  
24 General Herbert Wechsler, September 11,  
25 1944 (emphasis added).

26 After revision, it read:

27 The Final Report of General DeWitt (which  
28 is dated June 5, 1943, but which was not made  
public until January 1944) hereinafter cited  
as Final Report, is relied on in this brief  
for statistics and other details concerning  
the actual evacuation and the events that  
took place subsequent thereto. The recital  
in the Final Report of circumstances  
justifying the evacuation as a matter of  
military necessity, however, is in several  
respects, particularly with reference to  
the use of illegal radio transmitters and  
shore-to-ship signalling by persons of  
Japanese ancestry, in conflict with the views  
of this Department. We, therefore, do not ask  
the Court to take judicial notice of the  
recital of those facts contained in the Report.

29 Id. (emphasis added).

30 The footnote that appeared in the final version of the  
31 brief merely read as follows:

1 The Final Report of General DeWitt (which is  
2 dated June 5, 1943, but which was not made  
3 public until January 1944), hereinafter cited  
4 as Final Report, is relied on in this brief  
5 for statistics and other details concerning  
6 the actual evacuation and the events that took  
7 place subsequent thereto. We have specifically  
8 recited in this brief the facts relating to  
9 the justification for the evacuation, of which  
10 we ask the Court to take judicial notice, and  
11 we rely upon the Final Report only to the extent  
12 that it relates to such facts.

13 Brief for the United States, Korematsu v. United States, October  
14 Term, 1944, No. 22, at 11. The final version made no mention of  
15 the contradictory reports. The record is replete with  
16 protestations of various Justice Department officials that the  
17 government had the obligation to advise the courts of the  
18 contrary facts and opinions. Petitioner's Exhibits A-FF. In  
19 fact, several Department of Justice officials pointed out to  
20 their superiors and others the "wilful historical inaccuracies  
21 and intentional falsehoods" contained in the DeWitt Report.  
22 E.g., Exhibit B and Exhibit AA, Appendices A and B hereto.

23 These omissions are critical. In the original proceedings,  
24 before the district court and on appeal, the government argued  
25 that the actions taken were within the war-making powers of the  
26 Executive and Legislative branches and, even where the actions  
27 were directed at a particular class of persons, they were beyond  
28 judicial scrutiny so long as they were reasonably related to the  
security and defense of the nation and the prosecution of the  
war. Plaintiff's Brief in Opposition to Demurrer before the  
District Court, at 11-13; Brief for the United States in  
Korematsu v. United States, in the Supreme Court of the United  
States, at 11-18.

1           Indeed, this emphasis on national security was reflected in  
2 the standard of review laid down in Hirabayashi v. United  
3 States, 320 U.S. 81, 95 (1943): "We think that constitutional  
4 government in time of war, is not so powerless and does not  
5 compel so hard a choice if those charged with the responsibility  
6 of our national defense have reasonable ground for believing  
7 that the threat is real." The Court acknowledged that it could  
8 not second guess the decisions of the Executive and Congress but  
9 was limited to determining whether all of the relevant  
10 circumstances "within the knowledge of those charged with the  
11 responsibility for maintaining the national defense afforded a  
12 rational basis for the decisions which they made." Id. at 102.

13           The government relied on the rationale of Hirabayashi in  
14 its memoranda in Korematsu. That rationale was adopted in  
15 Korematsu. 323 U.S. at 218-24.

16           In Hirabayashi and Korematsu, the courts at each level  
17 engaged in an extensive examination of the facts known to the  
18 Executive and Legislative Branches. The facts which the  
19 government represented it relied upon and provided to the courts  
20 were those contained in a report entitled "Final Report,  
21 Japanese Evacuation from the West Coast" (1942), prepared by  
22 General DeWitt. His evaluation and version of the facts  
23 informed the courts' opinions. Yet, omitted from the  
24 government's representations was any reference to contrary  
25 reports which were considered reliable by the Justice Department  
26 and military officials other than General DeWitt.



1 A close reading of the briefs filed in the District Court  
2 by the government and amicus curiae State of California shows  
3 they relied heavily on the DeWitt Report for the facts  
4 justifying their military necessity arguments.<sup>9/</sup>

5 There is no question that the Executive and Congress were  
6 entitled to reasonably rely upon certain facts and to discount  
7 others. The question is not whether they were justified in  
8 relying upon some reports and not others, but whether the court  
9 had before it all the facts known by the government. Was the  
10 court misled by any omissions or distortions in concluding that  
11 the other branches' decisions had a reasonable basis in fact?  
12 Omitted from the reports presented to the courts was information  
13 possessed by the Federal Communications Commission, the  
14 Department of the Navy, and the Justice Department which  
15 directly contradicted General DeWitt's statements. Thus, the  
16 court had before it a selective record.

17 Whether a fuller, more accurate record would have prompted  
18 a different decision cannot be determined. Nor need it be  
19 determined. Where relevant evidence has been withheld, it is  
20 ample justification for the government's concurrence that the  
21 conviction should be set aside. It is sufficient to satisfy the  
22 court's independent inquiry and justify the relief sought by  
23 petitioner.

#### 24 25 OTHER REQUIREMENTS FOR CORAM NOBIS RELIEF

26 Petitioner has met the other requirements necessary to have  
27 his petition for a writ of coram nobis granted. One of the  
28 factors traditionally considered relevant is generally described

1 as "mootness", but is more specifically stated in terms of  
2 whether a petitioner who has already fully served his sentence  
3 suffers any collateral consequences such that he should be  
4 permitted to apply for a writ of coram nobis. At one time it  
5 was presumed that the burden was upon the petitioner to show the  
6 existence of collateral consequences. More recent cases have  
7 moved toward the view that collateral consequences are to be  
8 presumed from the fact of a criminal conviction. The Supreme  
9 Court has, in fact, stated that a "criminal case is moot only if  
10 it is shown that there is no possibility that any collateral  
11 legal consequences will be imposed on the basis of the  
12 challenged conviction." Lane v. Williams, 455 U.S. 624, 632  
13 (1982) (quoting approvingly Sibron v. New York, 392 U.S. at 57).  
14 This articulation places the burden on the government to show  
15 that petitioner suffers no collateral consequences. Petitioner  
16 has filed a certificate setting forth the collateral  
17 consequences he believes he suffers and will continue to suffer  
18 as a result of the conviction. The government, by its  
19 "Response" has failed to come forward with evidence to overcome  
20 the presumption.

21 The government has also failed to rebut petitioner's  
22 showing of timeliness. It appears from the record that much of  
23 the evidence upon which petitioner bases his motion was not  
24 discovered until recently. In fact, until the discovery of the  
25 documents relating to the government's brief before the Supreme  
26 Court, there was no specific evidence of governmental misconduct  
27 available.  
28

1           There is thus no barrier to granting petitioner's motion  
2 for coram nobis relief.

3  
4           CONCLUSION

5           The Supreme Court has cautioned that coram nobis should be  
6 used "only under certain circumstances compelling such action to  
7 achieve justice" and to correct "errors of the most fundamental  
8 character." United States v. Morgan, 346 U.S. 502, 511-12  
9 (1954). It is available to correct errors that result in a  
10 complete miscarriage of justice and where there are exceptional  
11 circumstances. See United States v. Hedman, 655 F.2d 813, 815  
12 (7th Cir. 1981).

13           Coram nobis also lies for a claim of prosecutorial  
14 impropriety. This Circuit noted in United States v. Taylor, 648  
15 F.2d at 573, that the writ "strikes at the veracity vel non of  
16 the government's representations to the court" and is  
17 appropriate where the procedure by which guilt is ascertained is  
18 under attack. The Taylor court observed that due process  
19 principles, raised by coram nobis charging prosecutorial  
20 misconduct, are not "strictly limited to those situations in  
21 which the defendant has suffered arguable prejudice; . . . [but  
22 also designed] to maintain public confidence in the  
23 administration of justice." Id. at 571.

24           At oral argument the government acknowledged the  
25 exceptional circumstances involved and the injustice suffered by  
26 petitioner and other Japanese-Americans. See also Response at  
27 2-3. Moreover, there is substantial support in the record that  
28

1 the government deliberately omitted relevant information and  
2 provided misleading information in papers before the court.  
3 The information was critical to the court's determination,  
4 although it cannot now be said what result would have obtained  
5 had the information been disclosed. Because the information was  
6 of the kind peculiarly within the government's knowledge, the  
7 court was dependent upon the government to provide a full and  
8 accurate account. Failure to do so presents the "compelling  
9 circumstance" contemplated by Morgan. The judicial process is  
10 seriously impaired when the government's law enforcement  
11 officers violate their ethical obligations to the court.<sup>10/</sup>

12 This court's decision today does not reach any errors of  
13 law suggested by petitioner. At common law, the writ of coram  
14 nobis was used to correct errors of fact. United States v.  
15 Morgan, 346 U.S. 502, 507-13 (1954). It was not used to correct  
16 legal errors and this court has no power, nor does it attempt,  
17 to correct any such errors.

18 Thus, the Supreme Court's decision stands as the law of  
19 this case and for whatever precedential value it may still have.  
20 Justices of that Court and legal scholars have commented that  
21 the decision is an anachronism in upholding overt racial  
22 discrimination as "compellingly justified." "Only two of this  
23 Court's modern cases have held the use of racial classifications  
24 to be constitutional." Fullilove v. Klutznick, 448 U.S. 448,  
25 507 (1980) (Powell, J., concurring and referring to Korematsu  
26 and Hirabayashi v. United States, 320 U.S. 81 (1943)). See also  
27 L. H. Tribe, American Constitutional Law §§16-6, 16-14 (1978).  
28

1 The government acknowledged its concurrence with the  
2 Commission's observation that "today the decision in Korematsu  
3 lies overruled in the court of history."


4 Korematsu remains on the pages of our legal and political  
5 history. As a legal precedent it is now recognized as having  
6 very limited application. As historical precedent it stands as  
7 a constant caution that in times of war or declared military  
8 necessity our institutions must be vigilant in protecting  
9 constitutional guarantees. It stands as a caution that in times  
10 of distress the shield of military necessity and national  
11 security must not be used to protect governmental actions from  
12 close scrutiny and accountability. It stands as a caution that  
13 in times of international hostility and antagonisms our  
14 institutions, legislative, executive and judicial, must be  
15 prepared to exercise their authority to protect all citizens  
16 from the petty fears and prejudices that are so easily aroused.

17  
18 ORDER

19 In accordance with the foregoing, the petition for a writ  
20 of coram nobis is granted and the counter-motion of the  
21 respondent is denied.

22 IT IS SO ORDERED.

23 DATED: APR 19 1984

24  
25  
26  
27   
28 MARILYN HALL PATEL  
United States District Judge

F O O T N O T E S

1/ Although the government referred in its papers to dismissal of the indictment, the defendant was in fact convicted upon an information.

2/ Indeed, it has been suggested that Rule 48(a), Fed. R. Crim. P., "contemplates public exposure of the reasons for abandonment of an indictment, information or complaint . . . ." United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n., 228 F. Supp. 483, 486 (S.D.N.Y. 1964).

3/ As discussed above, a full evidentiary hearing is not always required. Petitioner's submissions in this case would ordinarily justify a hearing and the court could not, in light of those submissions, deny the petition without affording a hearing. See Lujan v. United States, 424 F.2d 1053 (5th Cir. 1970). However, it is clear from the results reached herein, that petitioner is not prejudiced by the failure to conduct an evidentiary hearing. The government is deemed to have waived its right to a hearing.

4/ Cf. United States v. Wilson, 690 F.2d 1267, 1273-74 (9th Cir. 1982) (explaining the need to state with specificity the grounds for objections and the consequences on appeal of the failure to do so).

5/ It should be noted that the report appears to meet the requirements of Rule 803(8) of the Federal Rules of Evidence as findings resulting from an investigation made pursuant to authority granted by law. Under the Rule, it would be deemed admissible absent a showing of lack of trustworthiness. Advisory Committee Notes to Exceptions 803(8). See also Letelier v. Republic of Chile, 13 Fed. R. Evid. Serv. 1731 (S.D.N.Y. 1983). There is nothing to suggest the report lacks trustworthiness. Admission of the report under 803(8) would allow it to be weighed along with other evidence, if any, and permit the court to make its own findings. Were the court to take judicial notice of the findings under Rule 201, by contrast, the findings would become conclusive.

6/ See Nebbia v. New York, 291 U.S. 502, 516-18 (1934) (joint legislative committee's report on the milk industry given substantial weight where over one year period the committee conducted thirteen public hearings, heard testimony of 254 witnesses, conducted extensive research and collected numerous exhibits).

7/ Personal Justice Denied (Washington, D.C., 1982) presents the findings of the Commission on Wartime Relocation and Internment of Civilians. The final report, which is not before the court, apparently contains the Commission's recommendations.

1       8/ For all intents and purposes, there may be little  
2 difference between admitting them on a non-hearsay basis and  
3 taking judicial notice of their existence, as opposed to taking  
4 notice of the facts contained in them.

5       9/ The upper echelons of the Justice Department were well  
6 aware of the unjustified reliance being placed on the DeWitt  
7 Report by the amici curiae. "It is also to be noted that parts  
8 of the [DeWitt] report which, in April 1942 could not be shown  
9 to the Department of Justice in connection with the Hirabayashi  
10 case in the Supreme Court, were printed in the brief amici  
11 curiae of the States of California, Oregon and Washington. In  
12 fact the Western Defense Command evaded the statutory  
13 requirement that this Department represent the Government in  
14 this litigation by preparing the erroneous and intemperate brief  
15 which the States filed." Exhibit B, p.3, Memorandum from Edward  
16 J. Ennis, Director of the Alien Enemy Control Unit, Department  
17 of Justice to Assistant Attorney General Herbert Wechsler,  
18 September 30, 1944.

19       10/ Recognizing the ethical responsibility to make full  
20 disclosure to the courts, Director Ennis pointed out to the  
21 Assistant Attorney General that "[t]he Attorney General should  
22 not be deprived of the present, and perhaps only, chance to set  
23 the record straight." Exhibit B, p.4, Appendix A hereto.  
24  
25  
26  
27  
28